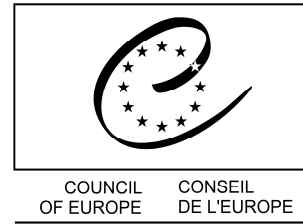




Ministry of Education, Science and Culture



Strasbourg, 21 April 2009

MCM(2009)021

**1st Council of Europe Conference of Ministers
responsible for Media and New Communication Services
A new notion of media?
(28-29 May 2009, Reykjavik, Iceland)**

European Newspaper Publishers' Association

***To what extent can the digital environment be considered a true opportunity for
newspaper publishers' exercise of freedom of expression?***

Challenges for press freedom in an evolving digital media environment

Introduction

Newspapers at national, regional and local level have often been first-movers to embrace the digital environment. Ever since their first exploits online, newspapers have placed great importance on respecting their crucial role as valuable contributors to the lifeblood of freedom of expression in democratic society.

Newspaper publishers have nonetheless explored many different business models to ensure that they continue to provide appropriate vehicles for freedom of expression in a democratic society. Many newspapers rely predominantly on advertising revenues rather than sales' (subscription deal or single-copy purchase price) revenues to be able to finance their content production. They are seeking stability in tough economic times through their innovative market initiatives for citizens. This lifeblood of democracy needs sustenance.

If newspaper companies' publishing activities in the digital field fail because of an unfavourable regulatory environment, the provision of news could be left in the hands of State broadcasters with perilous consequences for press freedom and media diversity.

One of ENPA's core aims is to seek recognition of the regulatory challenges facing publishers by national authorities and European bodies and institutions to be able to embark on seeking a suitable solution.

ENPA's work covers many issues which it addresses with international institutions such as the EU in addition to the Council of Europe to ensure that the newspaper publishers' activities on all platforms in Europe continue to contribute to the diverse media landscape, to name but a few: the lowest possible taxation (such as VAT) for digital newspaper publishing, defending the right to freedom of expression including guaranteeing the right to commercial speech, ensuring the efforts of newspapers in the domain of citizens' media literacy are realised.

In this paper however, ENPA would like to focus on bringing three key issues to the attention of policy makers at the 1st Council of Europe Ministers' conference on media and new communication services:

- Freedom of expression in relation to anti-terrorism laws, national security legislation and protection of sources.
 - Freedom of expression for newspapers' digital activities in relation to public service broadcasting, online news aggregators, copyright and ISP content control.
 - Freedom of expression in relation to media pluralism.
- **Freedom of expression in relation to anti-terrorism laws, national security legislation and protection of sources.**

This is a serious concern for newspaper publishers who have a special position as gatherers and disseminators of information to be able to evaluate and assess information in view of publication. Governments claim that they are under intense pressure to do whatever it takes to put the security of their citizens and territory first in the fight against terrorism. Unfortunately, this has been interpreted rather widely by certain authorities who have taken the sense of willingness by citizens to be protected as an open invitation to further fragment their fundamental freedoms such as allowing their movements and communications to be tracked and recorded in detail, for example the way in which government has access to data retention.

If a journalist wants to protect his/her source, as ECHR case-law legitimately allows him/her to do, how can the journalist be sure that such gathered information for data retention legislation compliance, such as contact number, contact duration, contact location at start of call and at end of call will not be used by authorities to identify that source? Reasonable safeguards for freedom of the press are needed and should be respected and adhered to if they exist.

Extending powers to grant more public bodies access to personal profiles on public or private databases is also a concern for the protection of journalistic sources, as is the creation of centralised

governmental “super-databases” which can build profiles of users, without safeguards for protection of sources, as has been the debate in the UK in 2008/2009.

National laws on protection of sources need to be fully up-to-date to cover electronic content as well as print content. ENPA also believes that States should work to prevent seizure of journalistic materials (computers, mobile phones, etc), a practice which is sometimes used as a way of circumventing laws on protection of sources. The use of journalists for information should be seen as a last resort rather than an “easy target”. ENPA refers to the recent ECHR case [Sanoma Uitgevers B.V. v. the Netherlands](#)¹ (31/03/2009) as a reference here: the dissenting opinions to the majority outlined how this judgment could have concerning important implications for moderation exercised by police forces in future in seizing journalistic “materials” (rather than simply “sources”).

However, in another respect, the publishing of information from what national authorities consider to be “secret” sources also needs strict attention. The need for journalists to be able to publish in the public interest for example in times of crisis should be better protected. State authorities seems too quick to exploit the sources of journalists and yet also too quick to defend their own sources which are in the public interest to know. There are several cases in point to illustrate this. Two key examples are:

- 1) ENPA has been very concerned² about the case of the Czech Republic’s new Act 52, passed on 5th February 2009 which amends Act no. 141/1961 Coll., on criminal court proceedings (Criminal Code), as amended by the later prescriptions, and certain other acts and is in force since April 1st, 2009. In October 2008, the wiretapping part of the law was pushed through – quickly and without any discussion with the media. It bans the publication by media of police-wiretapping information even where it is in the public interest to do so. Specifically, it is banned to publish the firstname/surname and/or address of a crime victim without his or her prior approval – even when it is a politician attacked on the street. This leads to many absurd situations, e. g. the media would not be allowed to publish if there would be an assassination attempt on the Czech Republic’s President because the media are unable to receive his approval for publication. This offence carries a disproportionate penalty fine of around EURO 180,000 and up to five years in prison for the offending journalist and the newspaper publisher.
- 2) The Italian Government is discussing a draft law in first reading of the lower house (Camera dei deputati) regarding wiretapping and data protection of telephone conversations that has proved a matter of serious concern not only for press publishers but also for journalists and other important institutions (for example the Supreme Court of Judges) which amounts to a serious threat to press freedom and for the newspapers’ right/duty to inform the public opinion. The three key features of concern which are embodied in certain draft amendments to the draft law are as follows:
 - 1) It will be forbidden to publish any news related to criminal investigations (even partially or in a summary form) until the end of the preliminary investigations’ period (6-18 months) or the end of the first stage of trial (not less than 2 years): this means in practice preventing the publication of any kind of news about criminals;
 - 2) The introduction of heavy sanctions for journalists and publishers who violate this ban: in particular, a jail term for journalists;
 - 3) A monetary sanction for publishers (a maximum 465.000 Euro for each single violation).

There are other issues in times of crisis for journalists, related to the digital environment. The widespread availability of ICT equipment and increasing citizen expertise in filming/producing their own material which is then encouraged for submission to newsrooms poses new dilemmas for the journalist. The obvious opportunity is that there can be a huge increase in the content that is sent to/made available to newsrooms. Newspapers are investing and evolving to meet these changing user needs but change takes time (according to the 2008 Global Newsroom Barometer from the World Editors’ Forum, 86% of newspaper executive survey respondents believe integrated print and online

¹ no. 38224/03.

² See ENPA press releases 15 April 2009 and 5 February 2009

http://www.enpa.be/index.php?option=com_content&task=view&id=191&Itemid=31
http://www.enpa.be/index.php?option=com_content&task=view&id=183&Itemid=31

newsrooms will become the norm in the short term - five years and 83% believe journalists will be expected to be able to produce content for all media within five years.)

However, the journalist also has a lot more material to sort through and so the professionally-developed expertise of the journalist to identify and compile relevant information from that available is vital: editors' priorities are to train their journalists in new media techniques whenever funding is available³. Some newspapers have developed specially-dedicated small teams to sort through information submitted from users and to moderate posted information. Yet moreover, newspapers are aware that they constantly have to question the reliability of the information received e.g. especially important in times of crisis, when a submitted digital video file edited in a certain way by a citizen or official could tell a very different story to the reality of events⁴. However, this is subject to newspapers' own ethical rules and training procedures and should absolutely remain a part of the editorial self-regulatory process rather than invite any intervention from authorities.

- **Freedom of expression for newspapers' digital activities in relation to public service broadcasting, online news aggregators, copyright and ISP content control.**

In light of new technological developments and the **expansion of public service broadcasters' activities and services** in recent years, ENPA believes that there is now a clear need for the Council of Europe to take a broader perspective on public service broadcasting in light of media pluralism in its next work cycle. Public service broadcasters should operate subject to a clearly defined public service remit⁵ in particular for new communication services, along with consideration of the potential market impact their new activities might have⁶. It is a question of media pluralism to ensure that the entire range of public service broadcasters' activities clearly promote broader democratic, social and cultural participation⁷ and at the same time Member States should regularly assess through an independent and external mechanism to the public service broadcaster that their new activities do not significantly distort the wider market because of the risk that poorly defined public service activities can crowd other private operators' services out of the market.

Newspaper publishers' concerns are based on their experience that some public service broadcasters are now operating commercial-like services which would otherwise have been well-provided by commercial operators. For example, the offer of free news services by public service broadcasters to commercial companies who would otherwise be willing to pay private news providers for high-quality news content. Private operators need access to revenues too, just as public service broadcasters are analysing new forms of financing and governance models. Further thought should seriously be given by national authorities about how to achieve a genuine balance between private and public provision of content.

- *Freedom of expression for newspapers' digital activities in relation to online news aggregators, copyright and ISP content control.*

ENPA has several concerns about the **activities of online news aggregators**. Newspaper publishers are concerned by the non-respect of copyright legislation by aggregators which are using newspapers

³ More than any other response to the question 'If provided more resources to invest in editorial quality, what would you do in the newsroom?', 35% of editors replied that they would invest in training for journalists in new media. Global Newsroom Barometer May 2008, World Editors Forum.

⁴ In this respect, please see comments of T. Balding, CEO of WAN on the publication of the book "New Media – The Press Freedom Dimension", WAN press release, 27 August 2007. Full book at http://www.wan-press.org/IMG/pdf/Final_Publication.pdf

⁵ As clearly indicated in Recommendation CM/REC(2007)3 of the Committee of Ministers to member states on the remit of public service media in the information society. Notably recommendation (i) "guarantee the fundamental role of the public service media in the new digital environment, setting a clear remit for public service media...." and II.6 "Member states should see to it that the goals and means for achievement of these goals by public service media are clearly defined, in particular regarding the use of thematic services and new communication services", as well as III.a.26. "Member States should establish a clear legal framework for the development of public service media and the fulfilment of their remit."

⁶ ENPA notes that this has been somewhat acknowledged by recommendation (iv) of the aforementioned Council of Europe Recommendation (2007)3, (31 January 2007): "enable public service media to respond fully and effectively to the challenges of the information society, respecting the public/private dual structure of the European electronic media landscape and paying attention to market and competition questions."

⁷ Recalling recommendation (ii) of Council of Europe Recommendation (2007) 3.

content to run their news and advertising businesses. Respect of copyright legislation as well as a trusted and balanced partnership between newspapers and news aggregators are key principles to be achieved in the interest of a continued investment in professional quality content.

Current legislation on copyright is enabling publishers to fulfil consumer needs. WIPO and the EU already provide the legal basis for ENPA members' activities in the field of **copyright**. This legal framework ensures a fair balance between exclusive rights and exceptions in the online and the offline world. It is an excellent basis for publishers' agreement and licensing of all types of news platform content with the users' community (public institutions, private companies, visually impaired communities, etc). There is therefore no need to open this debate further in the Council of Europe.

The **cooperation of Internet Service Providers** for content control, either in the field of copyright enforcement or in other areas, is problematic in terms of respect of freedom of expression and access to information. Only a judge should be able to decide whether to cut or not Internet access, or to ask for a specific action on the Internet in full respect of fundamental rights and freedoms.

- **Freedom of expression in relation to media pluralism.**

Newspapers need States to realise that media pluralism is best assured through rules which do not inhibit newspapers' ability to survive across different platforms in the multimedia environment.

Newspapers online are not destined to remain as PDF copies of their print counterparts. The model must evolve with citizens' needs. Newspapers online are expensive to establish and maintain if they are to have a life beyond their print versions, which is necessary in today's competitive converging media landscape. Acquisition of a variety of successful or emerging standalone media outlets may help to support loss-making titles which, whilst facing circulation challenges, still make a valuable contribution to media diversity.

Newspapers need flexible media pluralism rules which enable them to access the necessary resources to innovate and fund the quality content that they are best known for e.g. the investigative reporting which is so important in times of crisis, such as reporting on anti-terrorism events.

Conclusion

Newspaper publishers are responding to new digital challenges, through the continued commitment to constantly reviewing their self-regulatory commitments and ensuring their adherence to ethical rules.

Recognition within the industry and by policymakers that training opportunities in new media are needed to allow newspapers to provide timely and relevant information is actively sought.

All in all, newspaper publishers call on ministers to take better account of the legislative obstacles encountered by newspaper publishers in the online environment by better assessing the impact of legislation on freedom of expression.

The new decisions that face newspaper publishers in the digital environment during the newsgathering process are part of the challenges which they accept in the genuine interest of providing reliable, responsible and trusted information to the citizen but they need the support of policymakers to be able to deliver on overcoming those challenges.